United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

955

APPELLANT'S BRIEF AND JOINT APPENDIX

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,115

JOSEPH NELLIS,
Appellant,

v.

CURTISS NATIONAL BANK,
a Corporation,
Appellee.

Appeal From the United States District Court for the District of Columbia

Civil Division

United States Court of Appeals
for the District of Columbia Circuit

FILED SEP 18 1967

Nathan J. Paulson
CLERK

JOSEPH L. NELLIS
888 17th Street, N.W.
Washington, D. C. 20006
Attorney for Appellant

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

QUESTIONS PRESENTED

1. Where the accommodation endorser of a promissory note receives no notice of the maker's default, and has not waived notice of dishonor, does such failure to notify the accommodation endorser discharge such endorser from any liability arising from said endorsement?

2. Does the inclusion of the words "without demand or notice" at the end of an acceleration clause in a promissory note, included in said note, constitute a waiver of dishonor?

3. Where the accommodation endorser of a promissory note receives no consideration for his endorsement and had endorsed said note as a personal accommodation approximately two months after its execution and delivery, and, at the time of endorsement, had no knowledge of any requirement made at the time of execution and delivery of said note that he should so endorse, does such failure of consideration discharge said accommodation endorser from any liability on said note?

4. Where Appellant asserts genuine issues of material fact in the trial court below and that court makes no findings of fact or conclusions of law, renders no opinion upon which its ruling is based and specifically omits a finding that there are no genuine issues of material fact, is an order directing summary judgment clearly erroneous and should such order be reversed?

INDEX

TABLE OF AUTHORITIES

CITATIONS

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,115

JOSEPH NELLIS,
Appellant,

v.

CURTISS NATIONAL BANK,
a Corporation,
Appellee.

Appeal From the United States District Court for the District of Columbia

Civil Division

BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

The Appellee, the Curtiss National Bank, Miami Springs, Florida, asserted a complaint on a promissory note against Appellant, an accommodation endorser, for a balance of $18,555.56, plus interest, costs, and attorney's fee, the original note having been in the amount of $30,000.

The complaint included an allegation that repeated demands for payment had been made, but did not state the dates thereof and did not allege any waiver of notice of dishonor on the part of the accommodation endorser. Appellant denied receipt of any notice of dishonor.

Furthermore, the complaint contains no allegation of consideration in support of appellant's accommodation endorsement.

Appellant, among the defenses asserted, alleged that there was no notice of dishonor given by Appellee to Appellant, and that there was a total failure of consideration for Appellant's accommodation endorsement and was therefore discharged from any obligation under the note.

Appellant moved to dismiss the complaint, and Appellee filed an opposition to the motion.

Appellee moved for summary judgment, setting forth a statement of material facts and a statement of authority; and Appellant filed opposition resisting said motion, filed his affidavit and that of Edward M. Dziura, and a statement of authorities.

The Court below denied Appellant's motion to dismiss and granted Appellee's motion for summary judgment against the Appellant in the sum of $18,555.56, plus interest, costs, and attorney's fee. This appeal followed.

This Court has jurisdiction under Title 28, Section 1291, United States Code Annotated.

STATEMENT OF THE CASE

On March 18, 1964, Appellant was president and stockholder of a corporation known as Mutual Employees Trademart, Inc. (a Florida corporation), which operated a retail store at 1055 Hialeah Drive, Hialeah, Florida. At that time, R. Paul Weesner, now deceased, a resident of Florida, was Vice President of the corporation, and

Edward M. Dzuira, a resident of Florida, was Executive Vice President. Messrs. Dzuira and Weesner had represented to Appellant that the business required a loan in the amount of $30,000 in order to embark upon a competitive advertising campaign and arranged for its consummation with Appellee. *Neither at the time of the loan arrangement nor subsequently has Appellant had any relationship whatever with Appellee as customer, borrower or otherwise.* On March 18, 1964, Appellant as president of the borrower signed a promissory note in the face amount of $30,000 designating Appellee as payee, with the proceeds of said note to be transferred to the corporation.

Approximately two months later, in or about May, 1964, and after execution and delivery of said note and after the proceeds has been paid to the maker-corporation, Appellant was advised that Appellee, despite its requirement of collateral security in the form of a mortgage on certain chattels of the corporation and, in the form of a lien on rentals to be received by the corporation, additionally required the personal endorsement of Appellant, otherwise the credit of Appellee extended to the corporation would be immediately revoked. Appellant was reluctant to agree to this new requirement, but was importuned by Messrs. Dzuira and Weesner to sign as an accommodator on the ground that Mr. Weesner had endorsed the note and Appellee had threatened to cut off the corporation's credit unless Appellant's personal endorsement was obtained. Accordingly, Appellant, although he had no knowledge of this requirement at the time of endorsement, endorsed the note in his individual capacity, solely as an accommodation to the corporation and to Messrs. Weesner and Dzuira.

For his personal endorsement, as stated, Appellant received no consideration whatever, either from Appellee with whom he had no personal business relationship whatever, nor from Messrs. Weesner, Dzuira or from the cor-

poration. The promissory note thus endorsed contained no waiver of dishonor.

From March 18, 1964, until April 5, 1966, Appellant knew only that payments were made on the note and that the principal and interest were being paid in accordance with the note's requirements. In or about November 1964, there was a default, Appellant has subsequently learned. On the date of default, approximately $12,000 of the original note had been paid to Appellee. At the time of default, Appellant subsequently learned, Appellee chose to accelerate the maturity date. Neither at that time nor subsequently, until suit was filed, did Appellant receive any notice of dishonor. At the time such knowledge was conveyed to Appellant, more than sixteen months had elapsed since the date of default.

Appellee, after suit was filed and answer and counterclaim had been made, moved for summary judgment. Mr. Weesner, against whom suit had also been filed originally, had passed away. The motion for summary judgment was granted and an order followed, from which this appeal was perfected. In granting summary judgment, the trial court made no findings of fact nor conclusions of law and rendered no opinion.

This Appeal followed.

SUMMARY OF ARGUMENT

1. Under the provisions of the District of Columbia and Florida Codes, the Appellee's failure to give notice of dishonor of the note to Appellant, discharged said Appellant from any liability thereunder.

2. Appellant did not waive notice of dishonor by virtue of having signed said promissory note, even where said promissory note contained an acceleration clause which included certain language erroneously construed below as a waiver, if the Summary Judgment ordered is correctly interpreted by Appellant.

3. Appellant, endorsing the promissory note approximately two months after its delivery and execution, and with no knowledge of a prior requirement that he endorse said note, received no consideration for his endorsement and is consequently discharged from any liability under the note.

4. Under Rule 56, F.R.C.P., an order for Summary Judgment should be reversed where Appellant asserts genuine issues of material fact in the trial court below and that Court makes no findings of fact or conclusions of law, renders no opinion upon which its ruling is based and erroneously orders summary judgment in the face of seriously asserted genuine issues of material fact.

ARGUMENT I

Appellee's Failure To Give Notice of Dishonor of the Note to Appellant Discharges Said Appellant From Liability.

The promissory note, upon which this suit is based, was dated March 18, 1964. The face amount of the note was $30,000. So far as Appellant knows, regular monthly payments were made in an amount approximating $12,000. A default occurred in or about November, 1964. However, the first notice to the Appellant that there had been a default was in April of 1966 when the present suit was instituted, more than sixteen months later. Thus, Appellant was never given notice of dishonor by Appellee.

Under Sections 28-507 and 28-701 of the District of Columbia Code, 1961 ed., and Section 673.3-501 of the Florida Code, 1966 ed., it is provided that when a negotiable instrument has been dishonored, notice of such dishonor must be given to each endorser, and that any endorser to whom such notice is not given is discharged.

Notice of dishonor is made necessary because, as a matter of judicial policy: "The endorser is entitled to

notice of dishonor so that he may know his liability and take steps to protect himself".[1]

Failure to provide an accommodation endorser with notice of dishonor must result in the discharge of the endorser.[2]

The Appellant was an endorser without notice of dishonor and should therefore be discharged.

ARGUMENT II

The Words Contained in the Acceleration Clause of the Note Did Not Constitute a Waiver of Notice of Dishonor and Consequently Appellant Did Not Waive the Requirement of Notice of Dishonor.

It is conceded that an explicit waiver contained in the body of a note becomes effective against the endorser. However, since a waiver of notice of dishonor is in derogation of rights granted to the endorser by statute, such a waiver must be unequivocably stated[3] and cannot be inferred from doubtful or ambiguous language.[4]

In the case at bar, the promissory note contains an acceleration clause which states:

> "Should the collateral herewith hypothecated be or become valueless, or depreciate in value, the makers further promise, on request, to furnish additional

---

1 *Bovay* v. *Fuller et al.*, (C.A. 8; 1933) 63 F2d 280.

2 *Bost* v. *Rexine Company*, (1925) 56 App. D.C. 34, 8 F2d 795; *Roberts* v. *International Bank*, (1928) 58 App. D.C. 871, 25 F2d 214; *Goldstein* v. *Brastone Corporation et al.*, (1938) 254 App. Div. 288, 4 N.Y.S.2d 909; *Nolan* v. *H. E. Wilcox Motor Company*, (1917) 137 Tenn. 667, 195 S.W. 581; *Worley* v. *Johnson*, (1910) 60 Fla. 294, 53 So. 543.

3 *Worley* v. *Johnson*, *supra*.

4 *Kramer* v. *Stryker et al.*, (1936) 274 Mich. 179, 264 N.W. 618; *Banco Di Napoli* v. *Rosenbaum*, (1935) 244 App. Div. 654, 280 N.Y.S. 242; *Millen-Wright Lumber Company* v. *McNett et al.*, (1928) 242 Mich. 369, 218 N.W. 709.

collateral. In case said additional collateral be not made promptly as hereinabove agreed, then this obligation in full at the option of the holder, shall forthwith become due and payable without demand or notice."

Because the trial court, in granting Appellee's Motion for Summary Judgment, failed to make any findings of fact or conclusions of law, Appellant has no means of knowing if that Court construed the language of this clause as a waiver of notice of dishonor. However, such a construction is erroneous, if indeed it was made. According to this clause, upon the happening of either one of two contingencies, the holder may, without the necessity of demand or notice to the maker or endorser, choose to accelerate the time of payment of the obligation.

In point of fact, the holder did make such an election.

Thus the phrase "without demand or notice" does not constitute a waiver of dishonor and, as a matter of law, falls far short of the clear and unequivocal language needed to constitute such a waiver.

The issue thus presented is strikingly similar to that of a case recently decided by this Court, *Gelman* v. *Public National Bank,* (U.S. App. D.C.; 1967) 377 F.2d 166.

In the *Gelman* case, appellant-endorser had unqualifiedly endorsed a negotiable note at the maker's request and for his accommodation, to enable the maker to obtain a loan. After default, the holder did not give appellant notice of dishonor.

The trial court granted summary judgment, accepting appellee-bank's contention that there was a waiver of notice of dishonor contained in the body of the note. There, as in the case at bar, the language in question was embodied in a provision conferring on the holder an optional power to accelerate payment.

In that case, unlike the case at bar, appellant in his appeal had the benefit of an opinion rendered by the trial court, and a finding, however erroneous, that there were no genuine issues of material fact.

In its decision on the case, this Court, by Judge Robinson, stated:

> "Our conclusion is that while the provision properly construed, authorized the bank to elect to call for payment of the note upon the happening of an event stated without prior demand or notice of intention to accelerate, *it was inefficacious to eliminate the necessity for notice to Appellant of the maker's dishonor* . . . In this conclusion, we are in agreement with other courts which have declined to construe waivers of notice in acceleration clauses as legitimate substitutes for waivers of notice of a dishonor by nonpayment." (Emphasis supplied.)

This Court then reversed the judgment of the District Court and remanded the case with directions to enter judgment in favor of appellant.

The phrase "without demand or notice", when contained in an acceleration clause, is universally construed as pertaining to the holder's ability to accelerate date of payment without notice and not construed as a waiver of an endorser's statutory right to notice of dishonor.[5]

The note which is the subject of the case at bar having been prepared by Appellee should be strictly construed against Appellee.

Appellant has not waived notice of dishonor and, since such notice was never given Appellant by Appellee, Appellant should be discharged.

Assuming however, *arguendo,* that the language of this acceleration clause *may* be construed as a waiver of notice

---

[5] *National Life and Accident Insurance Company* v. *Varner et al.*, (Tenn; 1937) 100 So.2d 662; *Clausen* v. *Forehand et al.*, (1929) 152 Wash. 310, 277 P. 827; *Fisher* v. *Hoke et al.*, (1939) 185 Okla. 535, 94 P2d 913.

of dishonor, there is raised a genuine issue of material fact and the order for summary judgment should be reversed.[6]

ARGUMENT III

Appellant, Having Personally Endorsed the Promissory Note Approximately Two Months After Its Execution and Delivery and Without Prior Knowledge of Any Requirement That His Personal Endorsement Would Be Required, Having Received No Consideration for His Endorsement, Is Discharged.

Appellant, at the time of execution of the promissory note, signed said note solely in his capacity as president of the maker-corporation, Mutual Employees Trademart, Inc. Appellant did not endorse said note, in his individual capacity, until approximately two months after the date of execution and delivery. Until the time of his endorsement as individual, Appellant had no knowledge of and had not consented to any agreement or arrangement that his personal endorsement would be required. Neither at the time of his personal endorsement nor at any other time did Appellant receive any consideration for his endorsement.

It is conceded that generally one who endorses a promissory note on an accommodation to another party is thereby bound, even where there is no consideration flowing to him, the consideration supporting the initial agreement being sufficient.

However, this general rule applies generally where said endorsement is made *contemporaneously with* execution of the instrument and has no application where, as Appellant contended below and contends here, the endorsement occurs *after* execution and delivery of the negotiable

---

[6] *Lucas* v. *Swan*, (C.A. 4; 1933) 67 F2d 106, 90 A.L.R. 210; *General Mortgage & Loan Corporation* v. *Dickey*, (1931) 274 Mass. 207, 174 N.E. 176; *American Fidelity & Casualty Company, Inc. v. The London & Edinburgh Insurance Company, Ltd.*, (C.A. 4; 1965) 354 F2d 214.

instrument and, furthermore, the accommodation endorser had no prior knowledge of an agreement that his endorsement would be necessary to complete the note.

In *Ann Arbor Construction Company* v. *Glime Construction Company* (1963), 369 Mich. 669, 120 N.W. 2d 747, the Court cited, with approval, the statement of the rule found in 95 A.L.R. 964:

> "'The general rule sustained by the great weight of authority is that the undertaking of one not a party to the original transaction, who, in pursuance of some subsequent arrangement, signs as surety, guarantor, or endorser after the original contract has been fully executed and delivered, is a new and independent contract, and to be binding must be supported by a new and independent consideration from that of the original contract.' This rule is properly applied where endorsements are made on an instrument subsequent to its execution and delivery."[7]

In *Murray* v. *Lichtman*, (U.S. App. D.C.; 1964) 339 F.2d 749, this Court reversed an order for summary judgment upon finding no new consideration to support an accommodation endorsement made after the contract of sale, for which the endorsement had been made, had been executed and delivered.[8]

---

[7] For other cases approving the above-stated rule, see *Moses* v. *National Bank of Lawrence County*, (1893) 149 U.S. 298, 37 L. Ed. 743, 13 S.Ct. 900; *Kiess* v. *Baldwin*, (1934) 64 App. D.C. 66, 74 F2d 470; *David* v. *Leighton*, (1920) 80 Fla. 594, 86 So. 564; *Young* v. *Jackson*, (Iowa; 1934) 255 N.W. 877; *Daracius* v. *Klimowicz*, (1938) 293 Ill. App. 627, 12 N.E. 2d 324; *Wood* v. *Einiger et al.*, (1940) 44 N.M. 636, 107 P.2d 557; *Eitel* v. *Farr et al.*, (1914) 178 Mo. A. 367, 165 S.W. 1191.

[8] For other cases applying the rule specifically to accommodation endorsers signing after execution and delivery of the negotiable instrument, who were discharged, see *Holder* v. *Doeman*, (1957) 351 Mich. 30, 87 N.W.2d 176; *London & Lancashire Indemnity Company* v. *Allen*, (1956) 272 Wisc. 75, 74 N.W.2d 793; *Bedrosian* v. *Der Manoulian*, (1926) 48 R.I. 40, 134 A. 851; *Devitt* v. *Foster et al.*, (Miss.; 1931) 132 So. 182; *Merchants' State Bank of Velva, N. D.* v. *Roline et al.*, (1925) 200 Iowa 1059, 205 N.W. 863; *Jackson* v. *Lancaster*, (1925) 213 Ala. 97, 104 So. 19.

As was stated, the only exception to the general rule that an endorsement made subsequent to execution and delivery of the negotiable instrument demands new and independent consideration is where the endorser had prior knowledge of an arrangement or agreement made at the time of execution that his endorsement would be required to complete the instrument. In the case at bar, Appellant had no such knowledge and hence the exception has no application to this case.

In support of its Motion for Summary Judgment in the Court below, Appellee cited *Fannin* v. *Fritter,* (Fla.; 1937) 172 So. 691, for the proposition that an accommodation endorsement need not be supported by consideration in order to be binding. Because the trial court, in granting the Motion, made no findings of fact or conclusions of law, it is impossible for Appellant to know the weight given to the *Fannin* case by the Court. However, Appellant respectfully submits that the *Fannin* decision is not in point since, there, the accommodation endorsement in question was made contemporaneously with the execution of the promissory note.

In the case at bar, however, the endorsement was made approximately two months after execution and delivery of the promissory note. Thus, the ruling of the *Fannin* case should not be applied to the case at bar.

Where an affirmative defense of failure of consideration has been asserted, the burden of showing consideration rests with the plaintiff.[9] Appellee has failed to sustain this burden, and indeed, there is nothing in the record which shows that Appellee made any attempt whatever to prove the absence of failure of consideration after it had been asserted by Appellant. In fact, the record is so incomplete because of the erroneous issuance of summary judgment by the Court below that this Court would be hard-pressed, Appellant believes, to either render its support

[9] *Seaboard Surety Company v. Harbison et al.,* (C.A. 7; 1962) 304 F2d 247.

to the *Fannin* decision cited by Appellee, or declare it to be inapplicable in the District of Columbia (which is, Appellant respectfully submits, what the law here ought to be).

There being a complete failure of consideration for the accommodation endorsement of Appellant, in his capacity as individual, he should be discharged.

ARGUMENT IV

Where Appellant Asserts Genuine Issues of Material Fact in the Trial Court Below and That Court Makes No Findings of Fact or Conclusions of Law and Renders No Opinion Upon Which Its Ruling Is Based, the Order Directing Summary Judgment Is Erroneous and Should Be Reversed and Appellant Discharged.

The trial court below, in entering an order for summary judgment, made no findings of fact or conclusions of law and rendered no opinion. This order, as will be shown, is contrary to the letter and spirit of Rule 56, F.R.C.P.

On appeal from a summary judgment, this Court should read as true the allegations of Appellant, the party against whom judgment was granted,[10] and all doubts are to be resolved in his favor and against Appellee.[11] Furthermore, the reviewing court should give the Appellant the most favorable view of the record.[12]

"A summary judgment . . . should never be entered except where the Defendant (movant) is entitled to its allowance beyond all doubt, and only where the conceded facts show Defendant's right with such clarity as to leave no room for controversy, with all reasonable doubts touching the existence of a genuine issue as to material fact

---

10 *Murray* v. *Lichtman, supra.*

11 *Dewey* v. *Clark,* (C.A.D.C.; 1950) 180 F2d 766.

12 *Libby* v. *L. J. Corporation,* (1957) 101 U.S. App. D.C. 87, 247 F2d 78.

resulting against the movant, giving the benefit of all reasonable inferences that may reasonably be drawn from the evidence to the party moved against''—*Realty Investment Company, Inc.* v. *Armco Steel Corporation,* (CA 8; 1958) 255 F.2d 323.

In the case at bar, genuine issues of material fact were raised in the record. Yet the trial court entered an Order for Summary Judgment, making no findings of fact or conclusions of law and rending no opinion.

At the very least, the trial court is required to find that there was no genuine issue of material fact *and its failure to do so, in itself, requires reversal of the judgment.*[13]

The lack of any findings of fact or conclusions of law has put this Appellant to great disadvantage, for, in prosecuting this Appeal, Appellant has been forced to conjecture as to the basis for the decision of the trial court.

The practice of granting a motion for summary judgment without the rendering of an opinion, without findings of fact or conclusions of law, has often been disapproved by this Court and others.[14]

In *Isen et al.* v. *Calvert Corporation,* (U.S. App. D.C., April 20, 1957), No. 20214, this Court noted:

> ''The District Judge made no findings and rendered no opinion. We find ourselves unable to perceive the basis upon which in granting summary judgment the District Judge had concluded that the corporate appellee as the moving party was entitled to judgment as a matter of law, Fed. R. Civ. P. 56 (c), after deciding

---

13 *Neff Instrument Corporation* v. *Colu Electronics, Inc.,* (C.A. 9; 1959) 269 F2d 668; *Hindes* v. *United States,* (C.A. 5; 1964) 326 F2d 150.

14 *United States* v. *Continental Oil Company,* (1964) 377 U.S. 161, 12 L.Ed.2d 213, 84 S.Ct. 1155; *Helms* v. *Duckworth, et al.,* (1957) 101 U.S. App D.C. 390, 249 F2d 482; *Steiner* v. *Wertheimer,* (C.A. 6; 1957) 250 F2d 574; *Bohn Aluminum & Brass Corporation* v. *Storm King Corporation,* (C.A. 6; 1962) 303 F2d 425.

> that there was no genuine issue as to any material fact. It is our judgment that the case should have been tried and accordingly we reverse."

Faced with the same problem, the granting of summary judgment by a District Judge without having made any express findings of fact or conclusions of law, another Appellate Court, in *Winter Park Telephone Company* v. *Southern Bell Telephone and Telegraph Company,* (CA 5; 1950) 181 F.2d 341, noted:

> "Our conclusions in this case should not be granted on an indefinite factual foundation, and we cannot proceed with any fair degree of confidence to a decision of this case in the circumstances here without the benefit of more definite findings of fact and conclusions of law by the Court below."

In the case at bar, the defenses here urged based upon the facts put forth by Appellant were urged below on affidavits and pleadings of record. The trial court ignored the genuine issues of material fact asserted by Appellant and thereby committed grievous error compounded by failure to provide this Court with a record upon which it could specify, with particularity, the issues which if decided properly would have resulted in Appellant's discharge from liability.

Where there are genuine issues of material fact and questions of law, and the trial court has made no findings of fact or conclusions of law to which an Appellate Court may look in order to properly dispose of the case, an order for summary judgment should be reversed.

CONCLUSION

In ordering summary judgment without findings, conclusions or stating the absence of genuine issues of material fact, the Court below committed substantial error.

Where a holder of a promissory note fails, upon default, to give the accommodation endorser of said note notice

of dishonor, the endorser is discharged from liability, in the absence of a waiver of such notice. In the case at bar, Appellant did not receive notice of default and had no knowledge of default until more than sixteen months after its occurrence. There was no waiver of the requirement of notice of dishonor.

Appellant personally endorsed the promissory note as an accommodation to the maker approximately two months after its execution and delivery. He had no knowledge at the time of his endorsement of any prior agreement or arrangement that his endorsement would be required. For his personal endorsement, Appellant received no consideration.

In granting summary judgment, the trial court failed to render any opinion or make findings of fact or conclusions of law. Appellant and this Court were both deprived thereby of any indication of the basis for granting summary judgment.

Appellant contends that since he did not receive notice as required by the District of Columbia and Florida Codes, and since he received no consideration for his personal endorsement, summary judgment should be reversed and Appellant is entitled to be discharged.

Respectfully submitted,

JOSEPH L. NELLIS
888 17th Street, N.W.
Washington, D. C. 20006
Attorney for Appellant

BEST COPY

from the origin

INDEX TO JOINT APPENDIX

AVAILABLE

bound volume

JOINT APPENDIX

[Filed on April 11, 1966]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 945—'66

CURTISS NATIONAL BANK, Miami Springs, Florida, *Plaintiff*

v.

JOSEPH NELLIS, Brawner Building,
888 Seventeenth Street, N. W., Washington, D. C.

and

R. PAUL WEESNER, c/o Progressive Aero Company,
Pompano Beach, Florida, *Defendants*

Complaint on Note

(1) Jurisdiction is founded on Section 28 U. S. C.A. Section 1348. Curtiss National Bank is a National Bank organized under the laws of the United States and is located in Miami Springs in the State of Florida, and Defendant Joseph Nellis is a citizen and president of the District of Columbia and the Defendant R. Paul Weesner is a resident of Florida who temporarily resides in the District of Columbia; the matter in controversy exceeds, exclusive of interest and costs, the sum of $3,000.00.

(2) Defendants on or about March 18, 1964, jointly and severally executed and delivered to Plaintiff a promissory note a copy of which is hereto annexed as Exhibit "A".

(3) Defendants jointly and severally owe to Plaintiff an unpaid principal balance of $18,555.56 and interest, and

despite repeated demands by the Plaintiff for payment, Defendants jointly and severally have failed to meet their just obligations.

WHEREFORE, Plaintiff demands judgment against Defendants in the sum of $18,555.56 plus interest, costs and a reasonable attorney's fee, and for such other and further relief as to the Court seems just and proper.

CURTISS NATIONAL BANK
By: WILLIAM D. KENDRICK
William D. Kendrick,
Vice President

STATE OF FLORIDA, SS:

William D. Kendrick being first duly sworn on oath says the foregoing is a just and true statement of the amount owing by Defendants to Plaintiff, exclusive of all set-offs and just grounds of defense, and that he is representative of Plaintiff, and has authority to verify this Complaint.

WILLIAM D. KENDRICK
Officer

Subscribed and sworn to before me this 5th day of April, 1966.

JOAN REILLY
Notary Public

Notary Public, State of Florida at Large.
My Commission Expires May 3, 1968.
Bonded through Fred W. Diestelhorst.

STEVEN A. WINKELMAN
Steven A. Winkelman, Esquire
Attorney for Plaintiff
413 Colorado Building
Washington, D. C. 20005

No. [redacted] $ 30,000.00

MIAMI SPRINGS, FLORIDA March 18, 1964

Eighteen (18) months after date, for value received, we, the undersigned, jointly and severally, promise to pay to the order of the CURTISS NATIONAL BANK of Miami Springs, Florida, hereinafter called the Bank, at its office in the City of Miami Springs, Florida, the sum of

******THIRTY THOUSAND AND NO/100THS****** Dollars

in regular monthly installments of $ 1,667.00 plus int., at 6 per cent p/a with interest beginning the 22 day of April, 1964, and an equal amount on the same day or date of each succeeding month thereafter with a last payment of $ 1,661.00 plus int. on the day of [blank], 196 6, with interest after maturity at the rate of 8 per cent per annum until fully paid. As collateral security for the payment of this Note, and any note given in extension or renewal thereof, and as security for the payment of any other liability or liabilities of the undersigned to the Bank, whether now existing or hereafter arising or accruing, the undersigned does hereby assign to and pledge with the Bank the following securities, viz:

Chattel Mortgage on Air Conditioning Units and Assignment of proceeds of Lease Contracts

Should the collateral herewith hypothecated be or become valueless, or depreciate in value the makers further promise, on request, to furnish additional collateral. In case said additional collateral be not furnished when so requested, or in case the payment be not made promptly as hereinabove agreed, then the obligation in full at the option of the holder hereof, shall forthwith become due and payable without demand or notice.

For the purpose of enforcing the payment of this obligation the holder shall have full power and authority to sell, assign, collect, compromise, transfer and deliver any and all collateral pledged or hypothecated to secure this note, whether original or additional, or so much thereof as may be requisite. Such sale may be made wherever the holder may direct, and may be public or private, after ten days' notice thereof has been given, by personal delivery or by registered mail, addressed to the undersigned at the address given at the time of making this note, such notice shall begin to run from the date of such personal notice or from the date of mailing, if such notice is given by registered mail, and the holder may become the purchaser of any or all of said collateral at any such sale.

In case this obligation is paid and the collateral herewith hypothecated is released, any maker depositing such collateral shall be or become liable to the holder on any other obligations, then the collateral deposited by such maker herewith hypothecated, or the proceeds thereof to the extent that they are not necessary in paying this obligation, may be held by the holder as collateral security and applied by it upon the terms herein set forth upon such other obligations of said maker as the holder may elect.

It is understood and agreed that the holder shall not be compelled to assert first as the collateral hypothecated for the security of this obligation, but may at its election require said obligation to be paid off by any maker or makers, endorser or endorsers, surety or sureties hereon, and to this agreement said makers, endorsers and sureties hereby specifically give their assent, and upon the payment of this obligation by the said makers, endorsers and sureties, or any of them, this note, together with the collateral aforesaid, if same is not held, pursuant to the preceding paragraph hereof, as security for any other obligation or obligations, may be transferred without recourse against the holder to the party or parties paying the amount represented by this note.

And each of us, whether principal, surety, co-maker, endorser, guarantor or other party hereto, hereby jointly and severally agree that additional makers, endorsers, guarantors or sureties may become parties hereto, either with or without notice to us or any of us, without affecting our liability hereon and hereunder, and each of us severally waives any and all benefit or relief from homestead exemption and all other exemptions to which the undersigned or any of them may be entitled under the laws or constitution of any other State, now in force, or hereafter to be passed, as against this debt or any renewal thereof, and each jointly and severally further waives presentment for payment, protest, and notice of protest, and non payment of this note, and all defenses by reason of any extension of time of its payment that may be given by the holder or holders to them or any of them.

The undersigned hereby authorizes CURTISS NATIONAL BANK OF MIAMI SPRINGS, FLORIDA to date this note as of the day when the loan evidenced hereby is made, or fix the date on which payments are to begin and to complete this note in any other particulars according to the terms of the said loan.

If this note be not paid as agreed and be placed with an attorney for collection, each of us, whether principal, surety, guarantor, or other party hereto hereby severally agree to pay all costs of collection, including reasonable attorney's fees.

The undersigned does hereby agree to be and remain liable to the Bank for any deficiency after any sale or sales made by the Bank hereunder together with interest thereon at the rate of 8 percent per annum until the same is fully paid.

Said Bank is hereby expressly authorized to retain any general or special deposit, collateral, real or personal, security or proceeds thereof, belonging to the undersigned, or any co-maker hereon, now or hereafter in possession of said Bank during the time this note remains unpaid, and before or after maturity apply same to this or any other debts or liabilities due or to become due to the holder of this note. The makers and endorsers of this note hereby give said Bank full authority to sell, in the manner provided by law, any such collateral and any other collateral at any time pledged to secure this note.

The holder hereof may collect a delinquency charge not to exceed 5c per dollar for each full dollar of each and every installment which is five or more days past due

Each person must sign name in full.

MUTUAL EMPLOYEES TRADEMART, INC. (M.E.T.) (Seal) ADDRESS

BORROWER

By Joseph Ellis (Seal) 1058 Hialeah Drive, Hialeah, Florida

XXXXXXXXXXXX

President (Seal) Joseph Ellis, Individually

R. Paul Weekner, Individually

[Filed on May 5, 1966]

Answer and Counterclaims of Defendant Joseph Nellis

FIRST DEFENSE

The complaint fails to state a claim against defendant upon which relief can be granted.

SECOND DEFENSE

1. Defendant admits the allegations of para. 1 of the complaint, except those relating to defendant Weesner.

2. Defendant denies the allegations of para. 2 of the complaint, and states affirmatively that the note in question was not jointly executed and delivered to Plaintiff by Defendant.

3. Defendant denies the allegations of para. 3 of the complaint, and demands strict proof thereof.

4. Defendant denies each and every other allegation contained in the complaint.

THIRD DEFENSE

1. The note alleged in the complaint was signed by Defendant as an accommodation with the understanding, agreed to by Plaintiff, that in the event of a default, the collateral chattel security specifically set forth in the note, namely chattel mortgage on air conditioning units and assignment of proceeds of lease contracts, be pursued by Plaintiff. This, Plaintiff has failed and refused to do. Plaintiff thus has waived any alleged default by Defendant.

2. Plaintiff at all times pertinent knew of this material condition of the contract.

3. Except as aforesaid, there was no consideration for said signature by Defendant on said note or for said note, and said Defendant at no time received any of the proceeds of said note, nor were said proceeds paid or delivered to Defendant by Plaintiff or anyone else.

4. With respect to the understanding referred to in para. 1 of this THIRD DEFENSE, Defendant states on information and belief, that prior to execution of the note, Plaintiff agreed to the exclusion from the note of the fourth descriptive paragraph thereof, beginning: "It is understood and agreed, ...".

5. The alleged agreement referred to in the complaint is void for want of any consideration whatsoever.

FIRST COUNTERCLAIM AGAINST DEFENDANT
R. PAUL WEESNER

1. Defendant R. Paul Weesner, on information and belief, is a citizen of the State of Florida whose signature appears as an accommodator on the note in controversy.

2. Should this Court determine, adjudge or decree any liability by this Defendant to Plaintiff and if this Defendant is indebted to Plaintiff for any sum mentioned in the complaint, he is indebted to it jointly with Defendant R. Paul Weesner.

WHEREFORE, the premises considered, Defendant demands judgment against Defendant R. Paul Weesner, in the amount of any judgment the Court may order in favor of Plaintiff and against this Defendant, plus interest, costs and reasonable attorney's fee.

SECOND COUNTERCLAIM AGAINST PLAINTIFF,
CURTISS NATIONAL BANK

1. Defendant has a claim against Plaintiff arising out of the transaction or occurrence that is the subject matter of said Defendant's Answer and First Counterclaim to Plaintiff's complaint, the adjudication of which involves only those parties presently before the Court.

2. Defendant and Defendant R. Paul Weesner signed the note in question as accommodators only with the understanding that a corporation, not made a party to the present

suit by Plaintiff, would receive the proceeds of said note and repay same according to its terms.

3. Plaintiff has failed to make said corporation, incorporated under the laws of the State of Delaware, a party to this action.

4. The original note was in the amount of $30,000.00, as set forth in the complaint and repaid by the aforesaid corporation in the principal amount of $11,444.44.

5. On or about November 20, 1964, while the note which is in controversy was current and in no respect in default, the landlords of the premises at 1055 Hialeah Dr., Hialeah, Florida, occupied by the corporation referred to in paras. 2 and 3 of this SECOND COUNTERCLAIM illegally took possession of said corporation's premises and sequestered and converted to their own use, the property, business records and chattels of said corporation. The aforesaid actions are currently the subject matter of a lawsuit entitled, "*Mutual Employees Trademart, Inc.*, a Delaware corporation, vs. *Jack Silverman* and *Max L. Cohen*, individually, jointly as trustees, In the Eleventh Judicial Circuit Court, in and for Dade County, Florida, No. 65L1054." The matter is presently in litigation.

6. Defendant, on information and belief, states that the facts recited in paras. 1 through 5 of this SECOND COUNTERCLAIM were and are well known to Plaintiff, and the fact that the corporation referred to was not in default on the said note at the time of the landlords' illegal entry upon the premises was well known to Plaintiff.

7. Nevertheless, Plaintiff failed and refused, and continues to fail and refuse to make any claim against said corporation on any occasion of alleged default by the corporation in 1964, 1965, and up to the very date of this suit.

8. On information and belief, at the time of the illegal possession referred to, the said corporation and its

licensees had on deposit in Plaintiff bank sums in excess of $25,000.00. Some of the aforesaid deposits were rentals due *which were specifically assigned* to said Plaintiff by the note in question. If a default occurred, Plaintiff was obligated to take action in its own interest at that time, by foreclosing upon the corporation's chattel, as recited in the note, and by securing the rentals deposited and in its own possession.

9. Plaintiff, on the basis of the averments of paras. 7 and 8 hereof, is guilty of laches.

10. During the year 1964, when the corporation referred to in this SECOND COUNTERCLAIM was a depositor in Plaintiff bank, Plaintiff wrongfully dishonored valid checks deposited by Defendant, to the damage of Defendant in the amount of $10,000.00.

WHEREFORE, defendant demands:

(1) That the Court dismiss the complaint herein, and

(2) That Defendant have judgment against Plaintiff in the sum of $25,000.00, with interest, costs and a reasonable attorney's fee.

NATHAN WECHSLER
Per J N
Nathan Wechsler
1420 K Street, N.W.
Washington, D. C.

JOSEPH L. NELLIS
Joseph L. Nellis
888 17th Street, N.W.
Washington, D. C.

[Filed May 6, 1966]

Answer to Counter-Claim

Comes now the Plaintiff and Counter-Defendant, Curtiss National Bank and in answer to the Counter-Claim designated as Second Counter-Claim in Answer and Counter-Claims of Defendant Joseph Nellis filed herein, states as follows:

FIRST DEFENSE

Said Counter-Claim fails to state a claim upon which relief can be granted against the Plaintiff and Counter-Defendant.

SECOND DEFENSE

Plaintiff and Counter-Defendant denies all the material allegations, if any, contained in said Counter-Claim.

WHEREFORE, Plaintiff and Counter-Defendant demands,

(1) That the Court dismiss the pleading designated as Second Counter-Claim against Curtiss National Bank with costs assessed against the Defendant, Joseph Nellis.

(2) For such other and further relief as to the Court seems just and proper.

Respectfully submitted,

STEVEN A. WINKELMAN
Steven A. Winkelman, Esquire
Attorney for
Plaintiff and Counter-Defendant
Curtiss National Bank
413 Colorado Building
Washington, D. C.

[Filed April 18, 1967]

Motion To Dismiss Complaint

Defendant Joseph L. Nellis moves the Court to dismiss the action because the Complaint fails to state a claim against defendant Joseph L. Nellis upon which relief can be granted in that as more particularly appears in the Affidavit of Joseph L. Nellis attached hereto and made a part hereof and in the accompanying Memorandum of Points and Authorities attached hereto.

JOSEPH L. NELLIS
Joseph L. Nellis
Attorney for Defendant
888 17th Street, N.W.
Washington, D. C. 20006
298-9100

[Filed April 18, 1967]

Memorandum of Points and Authorities Accompanying Motion To Dismiss

The recent case of *Gelman* v. *Public National Bank* decided by the United States Court of Appeals for the District of Columbia Circuit on March 31, 1967, makes it clear that "For an indorser without qualification the NIL forged an engagement to pay the amount of the instrument 'if it be dishonored and the necessary proceedings on dishonor be duly taken' ". The Court further states "that notice of a dishonor, unless legally excused, be given to each indorser, . . . and that any indorser not furnished such notice shall be discharged."

The Court goes on to state that judicial precedents exhorted strict observance of these mandates, even as to accommodation indorsers and cites *Lucas* v. *Swan,* 67 F.2d 106, 90 A.L.R. 210 (4th Cir. 1933); *Sandler* v. *Scullen,* 290 Mass. 106, 194 N.E. 827 (1935); *First National Bank* v.

Michigan-Arkansas Oil Corp., 231 Mich. 597, 204 N.W. 719 (1925), as authority for this. In the case at bar, no notice of dishonor or default by the maker was given to defendant Nellis; accordingly, for this and the other reasons stated in *Gelman* v. *Public National Bank*, the Complaint should be dismissed.

Respectfully submitted,

JOSEPH L. NELLIS
Joseph L. Nellis
Attorney for Defendant
888 17th Street, N.W.
Washington, D. C. 20006
298-9100

[Filed April 18, 1967]

Affidavit of Joseph L. Nellis

DISTRICT OF COLUMBIA, SS.:

1. The Complaint in this case alleges that defendant Nellis executed as guarantor a promissory note dated March 18, 1964, of which Mutual Employee Trademart, Inc. was the maker of the note.

2. Defendant Nellis states that while he endorsed the note at the request of defendant Weesner as an accommodation for the maker and of defendant Weesner, plaintiff failed to give this defendant notice of any dishonor.

3. Plaintiff does not allege that it notified either defendant of the default and your affiant has no knowledge of any notice of default sent to the maker.

JOSEPH L. NELLIS
Joseph L. Nellis

Sworn to and subscribed before me
this 13th day of April, 1967.
s/ JULIET SCHNEIDER
Notary Public

[Filed April 20, 1967]

Memorandum of Points and Authorities in Opposition to Defendant's Motion To Dismiss

Comes now the Plaintiff, Curtiss National Bank, and in opposition to Defendant's Motion to Dismiss states as follows:

(1) The Defendant, Joseph Nellis, as set forth in the affidavit of William D. Kendrick in support of Plaintiff's Motion for Summary Judgment now pending before this court, jointly and severally executed as co-maker a promissory note, a copy of which is appended to Plaintiff's Motion for Summary Judgment, dated March 18, 1964 in the face amount of Thirty Thousand Dollars ($30,000.00). Said note was delivered to Curtiss National Bank, the payee, for valuable consideration, and the latter is and always has been the holder of the note.

(2) The aforesaid note provides that payment is to be made in monthly installments and further, it is explicitly stated that in the event of a default in payments the obligation at the option of the holder shall forthwith become due and payable "without demand or notice." In addition to the express waiver of demand and notice contained in the acceleration clause, the note contains a separate waiver provision which clearly states:

> . . . and each of us, whether principal, surety, co-maker, endorser, guarantor or other party hereto, hereby . . . jointly and severally further waives presentment for payment, protest, and notice of protest, and non-payment of this note . . .

(3) Subsequent to the execution of said note there was a default in the payments due thereon, as a result of which Curtiss National Bank chose to accelerate the maturity date. Upon request, Defendant Nellis has failed and refused to pay his just obligation under this note.

(4) The laws of the District of Columbia and the State of Florida provide for waiver of notice in negotiable instruments.

(a) D. C. Code, Sect. 28-721 (1961 Ed.) Notice of dishonor may be waived either before or after the omission to give due notice and the waiver may be expressed or implied.

(b) D. C. Code, Sect. 28-722 (1961 Ed.) Where the waiver is embodied in the instrument itself it is binding upon all parties . . .

(c) *Younghusband* v. *Ft. Pierce Bank & Trust Co.*, 100 Fla. 1088, 130 So. 725 (1930) Where a note contains a waiver as to dishonor or protest in the instrument it is binding upon all parties to the instrument.

(5) The Motion to Dismiss filed by Defendant Nellis is founded upon the alleged failure of the Plaintiff to provide Defendant Nellis with Notice of Dishonor. In support of his Motion, the Defendant cites the recent case of *Gelman* v. *Public National Bank,* No. 20,353, USCA for D. C., March 31, 1967. That case involved a negotiable note in the amount of $12,500.00 payable in 120 days. Said note contained an elaborate acceleration clause which enumerated a plethora of events upon which acceleration could be exercised. (See Footnote #1 in the decision). Couched in this labyrinth was the clause ". . . default in payment or performance of this note or any other obligation to or acquired in any manner by payee; or if at any time in the sole opinion of the financial responsibility of any of them (sic) shall become impaired or unsatisfactory, then this note and all other obligations, direct or contingent, of any maker, endorser or guarantor hereof, to payee shall become due and payable immediately without notice or demand."

The note in that case was not accelerated but rather the maker failed to pay it at its stated maturity date. The Defendant, an accommodation endorser received no notice

of the failure of the maker to pay the note. The Plaintiff argued that the aforementioned waiver provision applied to a dishonor by nonpayment on the date of maturity. The court found that the waiver provision in the note pertained only to the acceleration clause and thus was operative only in the event of acceleration and as there was no acceleration and also no waiver in the event of dishonor at the date of maturity, it then remained necessary for the holder of the note to give notice of dishonor upon nonpayment at maturity. In so holding the court stated:

> "The language upon which appellant's waiver of notice of dishonor supposedly rests is but a small fraction of a comprehensive provision cast wholly in the mold of an acceleration clause . . . Our conclusion is that while the provision properly construed authorized the bank to elect to call for payment of the note upon the happening of an event stated without prior demand or notice of intention to accelerate, it was inefficacious to eliminate the necessity for notice to appellant of the maker's dishonor by nonpayment at its designated maturity."

Thus the court clearly holds that the waiver provision would have been effective in the event of acceleration. The case presently at bar is clearly distinguishable from the *Gelman* case. The note here in question was an installment note with an acceleration provision in the event of default in any of the payments.

In this case, as contrasted with the *Gelman* case, there was an acceleration. Not only was there a specific waiver of demand and notice in the acceleration clause, which parenthetically, the *Gelman* case recognizes as an effective waiver in the event acceleration does occur, but the note here in question also contained a separate and all-pervasive waiver clause covering any and all events. Thus the *Gelman* case is unequivocally distinguishable and consequently, in accordance with laws of the District of Columbia and the State of Florida, Defendant Nellis is

bound by the waiver of notice contained in his promissory note.

WHEREFORE, Plaintiff Curtiss National Bank prays that Defendant's Motion to Dismiss be denied and judgment be entered in favor of the Plaintiff with interest and costs.

STEVEN A. WINKELMAN
Steven A. Winkelman, Esquire
Attorney for Plaintiff
Suite 413, Colorado Building
1341 G Street, N. W.
Washington, D. C. 20005
638-1686

[Filed October 11, 1966]

Order

This cause comes before the Court on the Motion of the Plaintiff for an Order dismissing Plaintiff's action against Defendant R. Paul Weesner; and upon consideration of this Motion, it is by the Court this 11th day of October, 1966,

ORDERED, that the Plaintiff's action against Defendant, R. Paul Weesner be dismissed without prejudice.

LEONARD P. WALSH
Judge

[Filed March 22, 1967]

Motion for Summary Judgment

The Plaintiff, Curtiss National Bank by Steven A. Winkelman, its attorney, hereby moves the Court to enter summary judgment for the Plaintiff in accordance with th provisions of Rule 56(a) and (c) of the Rules of Civil Procedure, on the ground that the pleadings, affidavit and

promissory note hereto attached and marked Exhibits "A" and "B", show that the Plaintiff is entitled to judgment as a matter of law.

STEVEN A. WINKELMAN
Steven A. Winkelman, Esquire
Attorney for Plaintiff
Suite 413 Colorado Building
1341 G Street, N. W.
Washington, D. C.
638-1686

Statement of Material Facts

(1) On March 18, 1964 Joseph Nellis jointly and severally executed a promissory note in the face amount of Thirty Thousand Dollars ($30,000.00), designating Curtiss National Bank as the payee.

(2) The aforesaid note was delivered to Curtiss National Bank in return for valuable consideration.

(3) Curtiss National Bank is presently and has been since the date of execution and delivery the holder of the note in question.

(4) The promissory note provides that payments are to be made in monthly installments and that in the event of a default in payment, the obligation, at the option of the holder, shall forthwith become due and payable without demand or notice.

(5) Subsequent to the execution and delivery of the aforementioned note there was a default in payment, and Curtiss National Bank chose to accelerate the maturity date.

(6) There presently remains an unpaid principal balance on the note of Eighteen Thousand Five Hundred Fifty-five

Dollars and fifty-six Cents, ($18,555.56) plus accrued interest.

(7) To date, Joseph Nellis has failed and refused to meet his just obligation on the note in question.

STEVEN A. WINKELMAN
Steven A. Winkelman, Esquire
Attorney for Plaintiff
Suite 413 Colorado Building
1341 G Street, N. W.
Washington, D. C.
638-1686

[Filed March 22, 1967]

Affidavit of William D. Kendrick

WILLIAM D. KENDRICK, first being duly sworn, deposes and says:

THAT, I am the Vice President of Curtiss National Bank, the Plaintiff in Civil Action No. 945-'66, *Curtiss National Bank* v. *Joseph Nellis,* and that I am duly authorized to act in its behalf.

To my personal knowledge and belief Joseph Nellis, the Defendant in the above-mentioned case, executed jointly and severally as co-maker a promissory note dated March 18, 1964 in the face amount of Thirty Thousand Dollars ($30,000.00). Said note was delivered to Curtiss National Bank, the payee for valuable consideration, and the latter is presently and has always been the holder of the note. The aforementioned note provides that payment is to be made in monthly installments and further that in the event of a default in payments, the obligation at the option of the holder shall forthwith become due and payable in full without demand or notice.

Subsequent to the execution of said note there was a default in the payments due thereon, as a result of which Curtiss National Bank, as holder of the note, chose to accelerate the maturity date. The face amount of the note remaining to be paid is Eighteen Thousand Five Hundred Fifty-five and fifty-six cents ($18,555.56) plus accrued interest. Upon demand, Mr. Nellis has refused and failed to pay his just obligation under the note, in consequence of which Curtiss National Bank has instituted the suit now before this Court.

s/ WILLIAM D. KENDRICK

Signed and sworn to before me this 17th day of March, 1967.

s/

Notary Public

[Filed March 22, 1967]

Points and Authorities in Support of Plaintiff's Motion for Summary Judgment

(1) Rule 56, Federal Rules of Civil Procedure.

(2) Promissory Note, a copy of which is attached hereto and made a part hereof, made out to the Curtiss National Bank as payee and jointly and severally executed by Joseph Nellis.

(3) The maker of a negotiable instrument by making it engages that he will pay it according to its tenor; and admits the existence of the payee and his then capacity to indorse.

Florida Statutes Annotated, Section 674.62
District of Columbia Code, 1961 Ed., Section 28-501

(4) An accommodation party is one who has signed the instrument as maker, drawer, acceptor or indorser, without receiving value therefor, and for the purpose of lending

his name to some other person. Such person is liable on the instrument to a holder for value notwithstanding such holder at the time of taking the instrument knew him to be only an accommodation party.

Florida Statutes Annotated, Section 674.32
District of Columbia Code, 1961 Ed., Section 28-206

(5) The maker of a note for which there was consideration, will not be permitted to contradict or vary his written contract by the introduction of parol evidence.

Strickland v. *Jewell* (Supreme Court of Florida 1920) 80 Fla. 221, 85 So. 670

American National Bank v. *Knab Co.*, (1958) 158 F. Supp. 695

(6) An accommodation indorsement does not have to be supported by consideration in favor of the indorser.

Fannin v. *Fritter* (Supreme Court of Florida 1937) 172 So. 691

STEVEN A. WINKELMAN
Steven A. Winkelman, Esquire
Attorney for Plaintiff
Suite 413 Colorado Building
1341 G Street, N. W.
Washington, D. C. 20005
638-1686

[Filed April 4, 1967]

Opposition to Motion for Summary Judgment

Comes now defendant Joseph L. Nellis and opposes the motion for summary judgment filed by plaintiff and in accordance with the provisions of Rule 56 F.R.C.P. states as grounds for his opposition, that the pleadings, the affidavits attached hereto and as more particularly set out

in the accompanying memorandum of points and authorities, there are genuine issues of material fact and plaintiff is not entitled to judgment as a matter of law.

JOSEPH L. NELLIS
Joseph L. Nellis
Attorney for Defendant
888 17th Street, N.W.
Washington, D. C. 20006
298-9100

[Filed April 4, 1967]

Points and Authorities in Opposition to Plaintiff's Motion for Summary Judgment

1. Rule 56 F.R.C.P. and the decisions of the Courts therein make it clear that no party may have summary judgment when there are genuine issues of material fact in dispute. The affidavits appended hereto along with the pleadings heretofore filed make it clear that there are a number of material facts which are in dispute.

2. An accommodation party who signs a guarantee without consideration at the urgings and behest of another guarantor is not liable to the payee of the note. It is a question of fact for the jury to determine whether any consideration flowed to the guarantor from his guarantee (D. C. Code, 1961 Addition, Section 28-206).

3. Where two accommodation makers sign and one of them dies after the institution of suit, and where, as here, the payee files a claim against the estate of the deceased party, the court will not enter summary judgment until the adjudication of the prior claim has been had.

4. Where a negotiable instrument recites on its face that the payee will proceed against the chattels and accounts receivable of the borrower, as here, it is a genuine

issue of fact to be determined by the jury whether such procedure was followed by the payee and accordingly, summary judgment is inappropriate.

5. There is no showing to date by the plaintiff that it in any way did or did not attempt to levy on the collateral security before filing suit against the endorsers. Such a showing is a genuine issue of material fact and must be determined by the jury.

Plaintiff in his paragraph 4 of statement of material facts has misstated the plain language of the note in that plaintiff has attempted to read into the note an option to proceed against endorsers before application of the collateral security which was pledged with the plaintiff and assigned by the maker. The note specifically recites that:

> "the holder shall have full power and authority to sell, assign, collect, compromise, transfer and deliver any and all collateral pledged or hypothecated to secure this note, whether original or additional, or as much thereof as may be requested. Such sale may be made wherever the holder may direct, and may be public or private, after ten days' notice has been given, by personal delivery or by registered mail, addressed to the undersigned at the address given at the time of making this note, such notice shall begin to run from the date of such personal notice or from the date of posting, if such notice is given by registered mail, and the holder may become the purchaser of any or all of said collateral at any such sale."

No notice as required by the aforesaid quotation from the face of the note was ever given by plaintiff to defendant. Notwithstanding the self-serving language relating to the alternative methods of collection stated in the note, it is a question of genuine and material fact as to whether or not the collateral hypothecated had ever been proceeded upon in accordance with the understanding of the parties.

The facts as to the failure of consideration alleged and as shown by the affidavits appended hereto and made a part hereof, are genuine issues of material fact requiring determination by a jury.

Accordingly, the motion should be denied.

Respectfully submitted,

JOSEPH L. NELLIS
Joseph L. Nellis
Attorney for Defendant
888 17th Street, N. W.
Washington, D. C. 20006
298 - 9100

[Filed April 4, 1967]

Affidavit of Joseph L. Nellis

DISTRICT OF COLUMBIA, SS.:

1. On March 18, 1964, in my capacity as president of Mutual Employees Trademart, Inc. and individually with R. Paul Weesner, now deceased, I executed a promissory note in the face amount of $30,000 with the plaintiff as payee.

2. I executed this note at the urgings and behest of R. Paul Weesner who insisted that the corporation follow the procedure of borrowing this money.

3. I signed the guarantee solely as an accommodation to R. Paul Weesner and received no consideration whatsoever either from the plaintiff, the corporation, or from R. Paul Weesner for my signature.

4. Since I made no promise to pay said obligation in the event of the liquidation of the business, I am not indebted to the plaintiff.

5. My defense is failure of consideration, among other things, and there are material and genuine issues of fact to be tried. The question whether plaintiff was within its legal rights in choosing to accelerate the maturity date of the note and whether its choice at a given date was prompted by factual considerations, is a major genuine issue of material fact to be tried.

6. Further, whether on the face of the note the collateral security, namely the chattel mortgage on air conditioning and assignment of proceeds of lease contracts, was required to be first proceeded against is an issue of law, but it is a genuine and material issue of fact as to whether or not plaintiff did in fact attempt to foreclose on the chattels and the assignment of proceeds given as collateral security for the note.

Further, deponent saith not.

JOSEPH L. NELLIS
Joseph L. Nellis

Sworn to and subscribed before me this 28th day of March, 1967.

/s/ JULIET SCHNEIDER
Notary Public

[Filed April 4, 1967]

Affidavit of Edward M. Dziura in Support of Defendant's Opposition to Motion for Summary Judgment

STATE OF FLORIDA:

ss.:

COUNTY OF DADE:

1. My name is Edward M. Dziura and I reside at 330 Atlantic Road, Key Biscayne, Miami, Florida. In November, 1964, and for some years prior to that date, I was executive vice president and general manager of a retail business known as Mutual Employees Trademart, Inc. located at 1055 Hialeah Drive, Hialeah, Florida. Joseph L. Nellis was president of that corporation and R. Paul Weesner was vice president. Both were stockholders and directors.

2. In or about February, 1964, we decided upon an expanded advertising program which required the expenditure of approximately $30,000.

3. At my request Messrs. Nellis and Weesner at different times accompanied me to the Curtiss National Bank where we did all of our banking and explained the purposes of the loan to the bank. The bank agreed to lend the corporation the $30,000 provided Mr. Nellis and Mr. Weesner personally guaranteed the note.

4. At Mr. Weesner's urging, Mr. Nellis endorsed the note, but said endorsement by Mr. Nellis was signed by him as an accommodation to Mr. Weesner. Mr. Nellis to my knowledge did not promise to pay the debt of Mutual Employees Trademart, Inc., but signed the guarantee at the behest of and as an accommodation to Mr. Weesner and the corporation.

5. To my own knowledge Mr. Nellis received no consideration whatsoever from either the corporation or Mr. Weesner for the execution of his guarantee.

6. Further, to the best of my knowledge and belief, Mr. Nellis never dealt with Curtiss National Bank as an individual nor did he receive any line of credit nor were any services performed for him by Curtiss National Bank.

7. I am advised and believe that the bank has filed a claim for the full amount of this present claim against Mr. Nellis and against the Estate of R. Paul Weesner in the Dade County Court.

8. On or about November 10, 1964, the retail business conducted by the corporation over which I was then executive vice president and general manager ceased doing business and has done no business since that time to my knowledge. Its assets were seized by the landlord and there is litigation in respect to this dispute.

EDWARD M. DZIURA
Edward M. Dziura

Sworn to and subscribed to before me this 31st day of March, 1967.

RICHARD LEE VERNON
Notary Public

(SEAL)

Notary Public, State of Florida at Large
My Commission Expires Sept. 5, 1970
Bonded through Fred W. Diestelhorst

[Filed May 12, 1967]

Order

This case having come on for hearing on Plaintiff's Motion for Summary Judgment and Defendant Nellis' Motion to Dismiss, the Court having examined the pleadings, affidavits, memoranda of points and authorities on file and having heard oral argument of counsel for Plaintiff and Defendant, it is by the Court this day of May, 1967.

ORDERED, that the Motion of Plaintiff for Summary Judgment against Defendant Joseph Nellis be, and the same is hereby granted in the amount of Eighteen Thousand Five Hundred Fifty-five Dollars and Fifty-six Cents ($18,555.56), plus interest from April 1, 1966 to date at Eight Percent (8%) per annum in the amount of Sixteen Hundred Seventy Dollars and Twenty-six Cents ($1,670.26); and interest at Six Percent (6%) per annum from the date hereof until payment of this judgment; and attorney's fees of Fifteen Percent (15%) of the unpaid principal balance due on the note in the amount of Twenty-seven Hundred Eighty-three Dollars and Thirty-two Cents ($2,783.32); and costs; and that the Defendant Nellis' Motion to Dismiss is hereby denied.

/s/
Judge

[Filed May 24, 1967]

Notice of Appeal

Notice is hereby given that Joseph Nellis, the defendant above-named, hereby appeals to the United States Court of Appeals for the District of Columbia Circuit from the Summary Judgment entered in this action on May 12, 1967.
Dated: May 19, 1967

JOSEPH NELLIS
Joseph Nellis
888 - 17th Street, N. W.
Washington, D. C. 20006
298 - 9100

Appellant.

Attorney for Plaintiff:

STEVEN A. WINKELMAN, Esquire
Colorado Building
Washington, D. C.